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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

Petitioner,

v.

NATIONAL ENDOWMENT FOR BROADCASTING, FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Newspaper Publishers Association (ANPA) prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 1, 1977.

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, appears as Appendix A of the petition of the Federal Communications Commission (FCC).[1]

[1] The FCC has petitioned for certiorari to review the same decision involved in this petition. FCC v. National Citizens Committee for Broadcasting, No. 76-1471 (filed April 22, 1977).

The opinions of the Federal Communications Commission are reported at 50 F.C.C.2d 1046 and 53 F.C.C.2d 589, and appear as FCC Appendices B and C.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1977, and appears as FCC Appendix D. A motion to stay the mandate filed by the FCC was granted in part by the court of appeals on April 5, 1977, and the court's order appears as FCC Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the FCC, consistently with the First and Fifth Amendments to the Constitution and the Communications Act, can adopt a general rule barring daily newspaper publishers from acquiring licenses for any broadcast stations in the communities where their papers are published and requiring broadcasters to forfeit their station licenses as a condition of exercising their right to publish daily newspapers in the communities served by their broadcast stations.

2. Whether the court of appeals overstepped the proper bounds of judicial review of an FCC rulemaking where, because of its different view of the relative weight to be accorded the factors of diversity and public service in broadcasting, it ordered the agency to direct the wholesale divestiture of existing broadcast stations affiliated with local daily newspapers despite the FCC's conclusion, after a balancing of the competing interests, that such action is unnecessary and not in the public interest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The Fifth Amendment provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Sections 2(a), 4(i), 4(j), 301, 303(g), 309(a), and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§152(a), 154(i), 154(j), 301, 303(g), 309(a), and 309(d)(1), are set forth in FCC Appendix F.

The FCC's Multiple Ownership rules, 47 C.F.R. §§73.35, 73.240, and 73.636, are set forth in FCC Appendix B at 114-121 and FCC Appendix C at 158.

STATEMENT

This case concerns the FCC's novel contention that it can discriminate against persons exercising, or desiring to exercise, their First Amendment right to publish a daily newspaper by placing them in a separate, unique class ineligible to obtain broadcast licenses in their local communities. It also concerns the policy judgment of the court below, which was rejected by the FCC after weighing all competing interests, that nationwide divestiture of existing broadcast stations affiliated with local daily newspapers is required to promote diversity regardless of other factors affecting public service.

The American Newspaper Publishers Association (ANPA) is a non-profit organization, whose membership consists of more than 1240 daily newspapers represent-

ing over 90 percent of the total daily and Sunday newspaper circulation in the United States. All of its members are vitally concerned with the unconstitutional premises under which the court of appeals has banned daily newspaper publishers, as a class, from ownership of colocated broadcast stations.

ANPA has consistently adhered in this case to its basic position that the constitutional limitations of the First and Fifth Amendments preclude the FCC from promulgating any general rule disqualifying daily newspaper publishers as a class from being granted licenses to operate broadcasting stations in the same communities where their newspapers are published.

This case arose from a rulemaking proceeding by the FCC, originally concerned solely with multiple ownership of broadcast stations. *Notice of Proposed Rulemaking (Docket No. 18110)*, 33 Fed. Reg. 5315 (1968). In response to urging by the Antitrust Division, unsupported by any specific allegations of anticompetitive practices by newspaper-broadcast combinations, the FCC expanded its inquiry to consider newspaper-broadcast cross-ownership. *Further Notice of Proposed Rulemaking*, 22 F.C.C.2d 339 (1970).

The rules proposed by the FCC, contrary to its longstanding recognition that initial licensing of newspaper publisher applicants for local broadcast licenses can serve the public interest and its repeated findings that renewal of such licenses also will serve the public interest, would have prohibited all licensing of new local broadcast stations to daily newspaper publishers and required divestiture of all existing combinations.

In response to the FCC's sweeping proposal nearly 200 parties, representing a full spectrum of interests, submitted comments and empirical evidence, the overwhelming thrust of which revealed numerous legal

and factual weaknesses in the FCC's proposal. ANPA, for example, provided the FCC with legal analyses demonstrating its lack of constitutional and statutory authority to discriminate against newspaper publishers, and empirical studies on the different journalistic characteristics of the press and broadcast media, the likely adverse economic consequences of its divestiture proposal, and the total lack of any public interest need or justification for the proposed new regulations.

When the FCC adopted its *Second Report and Order*, 50 F.C.C.2d 1046 (1975), it asserted, for the first time, a claim that it has authority to adopt general rules discriminating against newspaper publishers. The FCC inferred such authority, not expressly conferred by its governing statute, from its undisputed power to allocate the broadcast spectrum. (FCC Appendix B at 65 ¶14.)

In the Commission's view, the expansion of its role, from regulation solely of "communications by wire and radio," 47 U.S.C. §151, to encompass jurisdiction to promulgate rules on newspaper-broadcast cross-ownership, was justified on grounds of promoting diversity. (FCC Appendix B at 65 ¶16.) The FCC dismissed the First Amendment objections to its proposed rules with the assertion that "the First Amendment does not protect business relations that are either unlawful or not in the public interest." (FCC Appendix B at 65 ¶16.) The FCC also declined to follow its own first General Counsel's opinion that it lacks authority to deny a newspaper publisher a broadcast license solely on public policy grounds, and it ignored repeated statements by the courts and responsible committees of Congress that it has no such authority. (FCC Appendix B at 66-67, ¶¶18-22.)

Upon its review of the evidence before it on cross-ownership, the FCC made numerous empirical findings, including: that, in general, there is substantial and increasing diversity in the mass media in most communities, with some exceptions (FCC Appendix B at 89-90 ¶¶100-101); that there is already significant diversity between affiliated broadcast stations and newspapers, so that divestiture would, in most instances, yield only a small increase in diversity (FCC Appendix B at 104 ¶¶131-132); and that newspaper-affiliated broadcast stations tend to be superior licensees (FCC Appendix B at 93 n. 26, 109-113).

The FCC concluded, under its newly asserted jurisdiction, to prohibit altogether any daily newspaper publisher from acquiring a new license for a broadcast station in his community or transferring to new ownership an existing combination. The sole basis given for these prospective rules was the FCC's statement that "[w]e think that any new licensing should be expected to add to local diversity." (FCC Appendix B at 90 ¶101.)

As to license renewals of existing combinations, the FCC found that in the majority of cases a combination of factors, including "a long record of service to the public," possible "disruption for the industry," and "hardship for individual owners" outweighed "a mere hoped for gain in diversity." (FCC Appendix B at 93 ¶109.) In a number of small market cases, where there is only one newspaper and one television or radio station, the FCC ordered divestiture within five years because of its opinion, reached without a factual inquiry into the specific circumstances of any of the individual markets involved, that the level of diversity was not great enough in these communities. (FCC Appendix B at 96-99 ¶¶113-117.)

Petitions for review were filed by ANPA and a number of other parties pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C. §402(a). The court of appeals affirmed the agency's prospective ban on newspaper-broadcast combinations, vacated the FCC's rules relating to existing combinations, and remanded.

The court below agreed with the FCC that a prospective ban on cross-ownership is consistent with the First and Fifth Amendments and is authorized under the Communications Act. (FCC Appendix A at 24-33.) The court also affirmed the FCC's policy judgment to give diversity determinative weight in future licensing at the expense of any other public service considerations. (FCC Appendix A at 18-24.)

Regarding the FCC's decision not to divest most existing combinations, the court rejected the agency's careful weighing of the numerous public interest factors and its evaluation of the factual record compiled in the lengthy rulemaking. The court asserted that "policy, not factual considerations" were paramount. (FCC Appendix A at 38.) It ordered the FCC to adopt a new policy and promulgate a new rule, which compels a "presumption" against cross-ownership under which, according to the court, "divestiture [will be] required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (FCC Appendix A at 60.)

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT HAS DECIDED IMPORTANT CONSTITUTIONAL QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The court below has held that the Federal Communications Commission is empowered to promulgate rules barring daily newspaper publishers as a class from holding broadcast licenses to serve their local communities. The lower court's decision, if allowed to stand, is certain to have a far-reaching and permanent impact upon both the broadcasting and newspaper publishing businesses. A daily newspaper publisher who is not now engaged in broadcasting would be required to suspend publication of his paper – or to sell it – as the price of entry into the broadcasting field. A publisher who currently holds a broadcast license in the community in which his paper is published would face the choice of abandoning or selling either his broadcasting or publishing interests. Moreover, the new FCC rules approved by the lower court will prevent broadcasters – often the only persons in a community who can combine journalistic expertise with adequate capital – from starting or acquiring new daily newspapers.[2]

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[2] Divestiture, as required on a broad scale by the court of appeals' action, could have a serious and counterproductive impact on diversity. This is the lesson of the forced separation of the Boston *Herald-Traveler* from its broadcast properties in the FCC's celebrated *WHDH* case. WHDH, Inc., 16 F.C.C.2d 1 (1969), *aff'd*, Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Only three months after WHDH went off the air, the *Herald-Traveler* ceased publication after 125 years, eliminating one of Boston's three daily newspapers without any increase in the number of electronic media outlets.

The court below failed to acknowledge the fundamental constitutional questions posed by the promulgation of rules instituting an outright ban on newspaper-broadcast cross-ownership. Any regulation conditioning the right to publish a daily newspaper on forbearance from engaging in broadcasting in the same community would constitute an impermissible abridgment by the government of the freedom of the press. The determination of the lower court that such regulations may, indeed must, be enacted finds no precedent in the decisions of this or any other Court, and is based upon a misconstruction of the decisions of this Court delineating the proper relationship of broadcasting to the First Amendment.

Because the broadcast spectrum is limited, the Commission must allocate its use so as to accommodate the interests of all and to serve the "public interest, convenience, and necessity." 47 U.S.C. §§ 301, 303, 309(a). "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). In its licensing activities, the Commission must make choices among various means of accommodating the public's interest in freedom of expression with the inherent limitations of the broadcast spectrum. No decision of this Court, however, supports the assertion, advanced by the Commission and approved by the court below, that the singling out of newspaper owners for subjection to exclusionary regulations, different from those applied to any other broadcast license applicants in a given community, is within the range of the agency's constitutionally permissible choices.

The court below apparently believed that *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), *Red Lion Broadcasting Co. v. FCC, supra*, and *FRC v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933), are dispositive of ANPA's assertion that the anti-newspaper rules violate the First Amendment rights of newspaper owners who wish to enter the broadcasting field or broadcasters who desire to become local newspaper publishers. Those cases, however, establish only that the First Amendment is not offended by the denial of a broadcast license under statutory "public interest" standards. None of the cases relied on by the court below addressed the right to publish a newspaper, a cherished First Amendment right distinct from the right of access to the broadcast spectrum.

This Court has frequently invalidated governmental actions that curtail expression by favoring certain classes of speakers over others. *See Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, ____ U.S. ____, ____, 45 U.S.L.W. 4043, 4045 (1976); *Police Department v. Mosley*, 408 U.S. 92, 97-98 (1972);[3] *Niemotko v. Maryland*, 340 U.S. 268 (1951). Indeed, the imposition of discriminatory burdens on the free press has been specifically condemned by this Court. In *Grosjean v.*

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[3] In Police Department v. Mosley, 408 U.S. at 100-101, the Court rejected the City of Chicago's argument that, although it permitted peaceful labor picketing, it could prohibit all non-labor picketing because, as a class, non-labor picketing is more prone to produce violence than labor picketing. The Court stated that such judgments are appropriately made on an individualized basis. *Id.* at 101. The anti-newspaper regulations approved by the lower court's decision in this proceeding similarly represent a "wholesale and categorical" judgment on a question more appropriately determined on an individualized basis – *i.e.*, whether a newspaper owner's licensing as a broadcaster serves the public interest.

American Press Co., 297 U.S. 233 (1936), the Court held unconstitutional a state tax on gross receipts from advertising imposed only on newspapers with weekly circulations over 20,000. The court below sought to distinguish *Grosjean* on the ground that the Commission's cross-ownership ban is designed to increase the diversity of information in circulation, whereas the tax in *Grosjean* worked to limit the circulation of information to the public. (FCC Appendix A at 30-31.) This argument, however, ignores the conclusion of this Court in *Grosjean* that "by the First Amendment it was meant to preclude the national government . . . from adopting any form of previous restraint upon printed publications, or their circulation." 297 U.S. at 249. Thus, this Court recognized in that decision a right to publish that is the necessary mechanism for ensuring the public's right to receive information from a diversity of sources. The lower court, by focusing only on the ultimate *public* right, negates the *individual publisher's* right which is its precondition.

The casual dismissal by the court below of the argument by ANPA based on *Speiser v. Randall*, 357 U.S. 513 (1958), is equally unconvincing. In *Speiser*, this Court struck down a statute that conditioned a special property tax exemption on the signing of a loyalty oath because the denial of the exemption would have had the effect of penalizing claimants for engaging in protected speech. The FCC cross-ownership ban would penalize free expression in much the same way: the regulations would deny a publisher the right to hold a broadcast license merely because he exercises his First Amendment right to publish a newspaper in the same location, or a broadcaster the right to enter the local daily newspaper business merely because he holds a federal license to engage in broadcasting.

The opinion below also falls back on the assertion that "[f]reedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult," citing *Associated Press v. United States*, 326 U.S. 1 (1945), to support that assertion. (FCC Appendix A at 30.) *Associated Press* stands, however, only for the proposition that the First Amendment provides no immunity from laws of general applicability – in that case the Sherman Act. The vice of the cross-ownership ban mandated by the lower court is that it is *not* a law of general applicability; it singles out newspaper publishers for special and discriminatory treatment. The regulations thus go far beyond the point of causing the same incidental difficulty to publishers as to other businesses. Rather, the FCC rules affirmatively burden the right to publish with the necessity of foregoing a right available to citizens engaging in any lawful occupation other than newspaper publishing. They do not merely "make publication more difficult"; they prevent it altogether if the would-be publisher happens to hold a local broadcast license.

The diversity arguments that underlie the lower court's decision are said to have their roots in the First Amendment. It has been held, however, by this Court on several occasions that the First Amendment is not to be used as a sword to require a particular form of government regulation to promote diversity. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). On the contrary, "the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be

expressed." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 260 (White, J., concurring).

As stated by this Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a regulation that incidentally tends to curtail free expression is valid only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." The legitimacy of the government's interest in promoting diversity in mass communications media is not denied; but it has not been established that the draconian remedy of complete separation of local publishing and broadcasting mandated by the FCC and approved by the court below is necessary to further that interest. The Federal Communications Commission has ample authority to supervise newspaper-affiliated broadcast stations to ensure their operation in the public interest and for decades has done so. In view of that authority and of the enforcement mechanisms available to the Commission, the wholesale classification of local newspaper publishers as ineligible to hold broadcast licenses is a far greater restriction than is necessary to further the governmental or public interest at stake.

The action of the court of appeals, in approving FCC regulations which single out an entire class of United States citizens, newspaper owners, for injurious and discriminatory treatment by barring them from eligibility for broadcast licenses in their community also raises serious questions under the equal protection guarantees found in the Fifth Amendment by *Bolling v. Sharpe*, 347 U.S. 497 (1954). The FCC's action affects a "basic civil right," namely, the right to publish a

newspaper, and, therefore, "strict scrutiny" of the discriminatory treatment is required. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). The court of appeals dismissed ANPA's equal protection argument in a footnote (FCC Appendix A at 29 n. 44), primarily relying on this Court's decision in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), which, however, is limited to classifications made in cases of purely economic regulation. The court of appeals failed to come to grips with the fact that where a classification is "closely intertwined" with First Amendment rights, this Court has made it clear that equal protection guarantees remain in full force and effect. *Police Department v. Mosley*, 408 U.S. at 95 (1972).

The potential impact of the decision below upon the structure of broadcasting and of the newspaper publishing business, the importance of the constitutional questions presented, and the unprecedented resolution of those questions by the lower court justify further review of the Commission's cross-ownership regulations by this Court.

II.

THE COURT OF APPEALS DECIDED A QUESTION REGARDING THE FCC'S STATUTORY AUTHORITY, OF CENTRAL IMPORTANCE TO THE ADMINISTRATION OF THE COMMUNICATIONS ACT, IN A WAY WHICH CONFLICTS WITH APPLICABLE GUIDELINES OF STATUTORY INTERPRETATION ESTABLISHED BY DECISIONS OF THIS COURT.

Given the constitutional impermissibility of a general rule denying newspaper publishers the right to obtain local broadcast licenses, and barring broadcasters from local newspaper publication altogether, it is hardly surprising that the Communications Act nowhere gives

the FCC express authority to promulgate such a rule. "We know of no provision of the statute or rule of law, and are cited to none, which forbids broadcasting by the owner of a newspaper." *Tri-State Broadcasting Co. v. FCC*, 96 F.2d 564, 566 (D.C. Cir. 1938). On the contrary, Section 309(a) of the Act envisions individualized consideration of "each application" – by means of an evidentiary hearing, if necessary – to determine whether the "public interest, convenience, and necessity" would be served by granting a broadcast license. 47 U.S.C. §309(a).

In *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942), the court of appeals stated that the FCC is not empowered to enact a rule barring newspaper ownership of broadcast stations, and emphasized the constitutional underpinnings of this limit on the FCC's authority.

The court below conceded that *Stahlman* "appears to resolve the question of statutory authority," but then attempted to slough off its prior language as "dicta . . . based on a reading of the Commission's Act that has not prevailed" (FCC Appendix A at 28), citing *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), as controlling. *Storer*, however, merely acknowledged the FCC's authority to allocate scarce spectrum by regulating the total number of broadcast stations which could be licensed to one entity. And *National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943), also cited by the court below in this connection, merely upheld the FCC's chain broadcasting (network) rules and had no bearing on its authority to pass anti-newspaper regulations.

The importance this Court attaches to defining precisely the parameters of the FCC's authority under the Communications Act is illustrated by two recent cases. In *United States v. Southwestern Cable Co.*, 392

U.S. 157 (1968), the Court, in agreeing with the FCC that 47 U.S.C. §152(a) gave it authority to regulate CATV as a form of "communication by wire or radio," noted that certiorari had been granted "to consider [the] important question of regulatory authority." *Id.* at 161. Four years later the Court heard another case directly concerning the FCC's statutory authority. Chief Justice Burger, commenting in a concurring opinion on the Court's 5-4 decision upholding the FCC's requirement that CATV systems originate programming, stated: "Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972). The issue of statutory authority presented by the instant case is certainly no less important, since the decision below has an impact on all daily newspapers – concededly not subject to regulation by the FCC – and the entire public which they and broadcast stations serve.

The court below failed to recognize that the FCC lacks the authority to adopt rules barring daily newspapers from affiliation with local broadcast stations primarily because it did not properly assess two types of evidence which are generally important in statutory construction, and are of the utmost importance in this case. First, the court improperly assessed the meaning and importance of a contemporaneous and long-standing prior administrative interpretation, that of Hampson Gary, first General Counsel of the FCC. Mr. Gary, only three years after passage of the Communications Act, received an inquiry from Senator Wheeler as to whether or not the Commission "has the authority, at the present time, to deny an application of a

newspaper for radio facilities, on the ground that it is against public policy." Mr. Gary summarized his position in response to the inquiry as follows:

> "In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy."[4]

As the first General Counsel of the FCC, Mr. Gary was uniquely aware of Congress' intent and purposes in enacting the Communications Act, and his interpretation is entitled to great weight in construing the agency's authority to enact the rules here in issue.[5] This Court summarized the applicable principle in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), ruling that a long-standing prior administrative interpretation:

> "has peculiar weight when it involves a contemporaneous construction of a statute by the men

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[4]Legal Opinion of FCC General Counsel Hampson Gary submitted to the Senate Interstate Commerce Committee, Jan. 25, 1937. *See* FCC Appendix A at 26.

[5]The decision below also attacks the relevance of Mr. Gary's statement on the grounds that he did not consider "whether the Commission may enact license qualifications in the public interest." But Mr. Gary was, indeed, responding to an inquiry as to whether the Commission "has the authority" to deny licenses to newspapers on "public policy" grounds. His response, in effect, was that "public interest," not "public policy," was the statutory standard, and that newspaper ownership was "one fact among others to be considered." Had Mr. Gary felt that "license qualifications" could be used to deny licenses to all colocated newspapers, it surely would have been appropriate for him to say so in his discussion of the FCC's "authority."

> charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

The other type of evidence bearing heavily on the issue of the FCC's statutory authority in this case, which the court below also improperly failed to assess, is the remarkably consistent history of subsequent legislative interpretation. The legislative history of the Communications Act reveals that authoritative committees of Congress, some years after the original enactment of the Act, affirmatively declared that the Commission lacks authority to ban newspaper ownership of broadcast stations. This occurred in the late 1940's and early 1950's, when Congress considered, and rejected as unnecessary, several bills that would have expressly prohibited the FCC from barring license applications from newspapers. These bills had been introduced as part of a general review by Congress of the manner in which the Communications Act had been interpreted and administered by the Commission during the preceding 20 years. The failure to adopt this legislation was explained by a House-Senate Conference Committee in 1952, as part of an extensive series of amendments and revisions to Title III of the Act, as follows:

> "under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper. . . ."

Conference Report No. 2426, 82nd Cong., 2d Sess. (1952).[6]

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[6] A similar Congressional statement is found at S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1950).

The court below dismissed this subsequent legislative interpretation in a footnote, labeling it "not useful in determining the meaning of the original legislation when enacted." (FCC Appendix A at 27 n. 41.) In so doing, it overlooked this Court's repeated teaching that a contemporaneous and longstanding construction of a statute by administrative officials, followed by a reenactment of or amendment to the Act which does not touch the administrative interpretation in question, is entitled to great weight. *See Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); 2A [Sutherland] Statutes and Statutory Construction §49.09 at 256-57 (4th ed. C. Sands 1973).

In sum, certiorari should be granted because an important question concerning the scope of the FCC's statutory authority is presented and merits consideration by this Court.

III.

THE COURT OF APPEALS USURPED THE FCC'S POLICY-MAKING ROLE IN A MANNER INCONSISTENT WITH ITS PROPER REVIEW FUNCTION AND APPLICABLE DECISIONS OF THIS COURT.

The FCC's conclusion not to order that most existing newspaper-broadcast combinations be divested was based on its weighing of numerous factors affecting the public interest as well as its judgments on key factual data before it concerning the level of existing diversity, such as the likelihood that there would be an increase in diversity from divestiture, the probable magnitude of that increase, and the quality of public service to be expected from unknown, new broadcast licensees as compared with the proven history of service by

newspaper-affiliated stations – as to which it even had a special factual analysis prepared by its own staff.

The court of appeals, while paying lip service to the rule of law that "courts are not to substitute their judgment for that of the Commission or review the facts de novo" (FCC Appendix A at 18), actually substituted its own policy evaluations concerning this evidence for those entrusted by Congress to the sound discretion of the FCC and in fact made by that agency in the proceeding below. This judicial policy-making is contrary to the proper role of the reviewing court, as that role has been frequently articulated and delineated in applicable decisions of this Court.

In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968), this Court held that:

> "The [court of appeals'] responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."

In particular, this Court has recently reiterated, in passing on judgments by the ICC under the same public interest standard as that contained in the Communications Act, that the weighing of consumer benefits against adverse impact on members of a regulated industry is "the kind of judgment that is entrusted to [the agency], a power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Likewise, here the balancing of the respective interests in diversity, competition, public service, and economic injury to existing licensees, was

precisely and preeminently "the kind of judgment that is entrusted to" the FCC.

Moreover, in this case, the court of appeals arrogated to itself subjective judgments concerning the evidentiary weight to be attached by the agency to major economic, statistical, and social studies filed with the Commission in the rulemaking proceedings below. Seriatim, the court of appeals undertook to substitute for the Commission's experienced and informed discretion the court's own objections to studies of the effect of common ownership on broadcast station performance, on inter- and intramedia competition, on the measuring yardsticks by which the Commission should gauge multiplicity and diversity of the media, and on the economic and competitive consequences of divestiture. The court reached its own factual conclusion, after reviewing this extensive evidence, that "the record was essentially inconclusive" on the question of whether widespread divestiture was required, and on the basis of *its* conclusion then proceeded to order the Commission to direct such divestiture solely on a priori diversity grounds. (FCC Appendix A at 49.)

The court attributed its own evidentiary conclusions to the Commission, and asserted that on this inconclusive state of facts "[h]ad the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for, subject to any appropriate exceptions." (FCC Appendix A at 49.) Implicit in this view of what is "rational" was the court's own value judgment that diversity is a preeminent factor which conclusively determines and delineates the public interest. The court rejected the FCC's contrary recognition that diversity

must be balanced with other factors, the most important of which was quality of programming service. The court did address some of the competing interests given importance by the FCC, including local ownership and management, continuity of operations, and local economic dislocations, but only to disagree with the weight assigned by the agency to these admittedly relevant factors. (FCC Appendix A at 52-58.)

In addition to departing from the correct standard of review by making its own weighing of public interest factors, the court of appeals also ignored this Court's mandate that "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Instead, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). "[A]n administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

Under these well-established principles, the FCC must retain full responsibility, on remand, to consider the "public convenience, interest, or necessity" in any further proceedings. *Id.* Yet, the court of appeals has ruled that the FCC, in the future, must adhere to a "presumption" of divestiture on remand. (FCC Appendix A at 60.) This overreaching by the court below violates the balance between the legislative and judicial functions identified in *Pottsville Broadcasting*, with the result that the court of appeals has read the applicable

standards of the Communications Act through the "distorting lenses" of its own policy preferences. 309 U.S. at 144.

The expansive standard of judicial review resorted to by the court of appeals in this case, and the single-valued notion of the public interest which resulted from the court's lack of judicial restraint will, unless modified on further review by this Court, have important consequences for the administration of the Communications Act. In the first place, the parties to FCC proceedings will be encouraged to take their dissatisfaction with FCC policy judgments to the several courts of appeals, thus prolonging the already lengthy administrative process and burdening those courts with matters properly consigned by the legislature to the agency's sound discretion. Second, a vast array of other issues, involving cross-ownership of other media, regional concentration of control, networks, conglomerate ownership, and comparative hearing policy – some only recently settled, others still under investigation – may have to be decided solely on the basis of promoting diversity, without attention to other factors. Thus, the lower court's improper substitution of its policy perceptions and values for those of the FCC presents an important question meriting plenary review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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